

HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

WILLIAM MCELROY,

Plaintiff,

v.

KING COUNTY, et al.,

Defendants.

CASE NO. C12-1299RAJ

ORDER

The parties have notified the court of their stipulation to dismiss this action with prejudice. Dkt. # 46. Rule 41(a)(1)(A)(ii) of the Federal Rules of Civil Procedure dictates that this matter is now DISMISSED, with prejudice.

One matter remains.

Counsel for Plaintiff William McElroy notified the court that his client had decided not to proceed to trial on December 12 at 8:00 a.m. Jury selection was set to begin five and a half hours later, at 1:30 p.m. The court commends court staff for working as quickly as possible to inform jurors that their service was no longer necessary. Despite their efforts, some jurors did not receive notice, and they appeared in court as their jury summons required. The court ORDERS that Plaintiff's counsel must pay the costs of summoning those jurors, \$766.12, and must do so no later than January 15, 2014.

The court now summarizes its reasons for assessing jury costs.

ORDER – 1

1 On December 5, the court issued an order limiting the scope of issues remaining
2 for trial. Trial was set to begin one week later, on December 12. Putting aside rulings on
3 motions in limine, the court strongly prefers to issue such orders at least a month before
4 trial, if not sooner. It did not do in this case because Defendants ignored court deadlines
5 for dispositive motions. The court narrowed the scope of trial based on the parties' trial
6 briefs. The "narrowing" in question was a straightforward application of the statute of
7 limitations. Plaintiff's counsel knew, or reasonably should have known, that his client's
8 claims based on intentional conduct were untimely. His timely claims were for
9 negligence. The December 5 order held that he could not recast as negligence his claims
10 that law enforcement officers had used excessive force against his client during an arrest.

11 The parties appeared before the court on November 20 for a pretrial conference.
12 Each received a copy of the court's pretrial conference checklist, which includes the
13 following paragraph:

14 **Settlement and Notification to the Court of Settlement:** Local Rule
15 39(d) states: "Where cases set for trial by jury are settled or agreed to be
16 tried without a jury, notice of such agreement shall be filed in the clerk's
17 office as soon as possible but no later than five (5) days before the day on
18 which the case is set; otherwise jury expenses incurred by the government,
19 if any, shall be paid to the clerk by the parties agreeing to such settlement
20 or waiver. And where a continuance of such a case shall be applied for by
one side, and resisted by the other, and granted by the court, the payment of
jury expenses incurred by the government, if any, by the party applying for
the continuance shall in all cases be one of the conditions of the
continuance unless such continuance be granted as a matter of right and
was not due to any fault of the moving party."

21 The parties are responsible for complying with the Local Rules in any event, but the
22 pretrial conference checklist is yet another reason that no party can credibly claim to be
23 unaware of the possibility that the court will require them to pay the cost of summoning
24 jurors if they do not timely inform the court of settlement or another reason that trial will
25 not begin as scheduled. The pretrial conference checklist in this case also gave the
26 parties a deadline of November 27 to notify the court of settlement without incurring jury

1 costs. The court discussed both the possibility of assessment of costs and the November
2 27 deadline at the pretrial conference.

3 November 27 came and went with no notice from any party.

4 The December 5 order concluded with the following paragraph:

5 The court reaches its rulings today aware that Mr. McElroy has not had an
6 opportunity to respond to the arguments that Defendants raised for the first
7 time in their trial brief. Accordingly, the court will permit him to present
any objections to this order in writing, no later than noon on Monday,
December 9.

8 Mr. McElroy presented no objections to the court's order.

9 On December 9, the court's staff contacted counsel for both parties to ask if it
10 would inconvenience them if the court moved the beginning of jury selection from 9:00
11 a.m. on December 12 to 1:30 p.m. Counsel for both parties responded that they had no
12 objection.

13 The court next heard from the parties by an email that Mr. McElroy's counsel sent
14 to Defendants' counsel and the court's in-court deputy clerk at 8:18 a.m. on December
15 12. The email began as follows: "In light of the Court's recent order clarifying claims
16 for trial, Mr. McElroy has decided against proceeding to Trial this afternoon." The email
17 attached a stipulation of dismissal. It offered no explanation whatsoever of why counsel
18 had not informed the court (or opposing counsel) of his decision sooner.

19 The deputy clerk quickly contacted this District's jury staff to inform them of the
20 last-minute development. As described in the declaration attached to this order, jury staff
21 worked diligently to prevent jurors from appearing unnecessarily. Despite their efforts,
22 five jurors appeared, including one who lives far from the courthouse who came to
23 Seattle the previous evening and stayed in a hotel. All told, the appearance of these
24 jurors cost the government \$766.12. Those costs would have been far greater had court
25 staff not acted quickly.

1 The costs the court just identified are almost certainly the result of the lack of
2 diligence of Mr. McElroy's counsel. Certainly counsel has presented no evidence that his
3 client changed his mind about trial at 8:00 a.m. on the morning trial was set to
4 commence. He has presented no evidence that he informed his client of the December 5
5 order in a timely fashion, informed his client of the possibility of paying jury costs, and
6 that his client nonetheless waited until the morning of trial to drop his claims. Lacking
7 any evidence that Mr. McElroy is personally at fault, the court orders his counsel to pay
8 \$766.12 in jury costs.

9 Payment is due no later than January 15. If counsel wishes, he may file a
10 declaration no later than December 24 in which he attempts to justify his last-minute
11 notification to the court, or attempts to shift responsibility for the last-minute notice to
12 someone other than him. The court will consider that declaration, and will issue another
13 order if it concludes that the declaration provides any basis for modifying this order.
14 Unless the court orders otherwise, however, counsel must make the payment to the Clerk
15 of Court no later than the close of business on January 15. If he does not, the court will
16 order counsel to show cause why he should not be held in contempt.

17 DATED this 13th day of December, 2013.

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20 The Honorable Richard A. Jones
21 United States District Court Judge
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